

# DEVELOPMENT OF A NEW INSURANCE PROTOCOL FOR MARINE CASUALTY RESPONSE

*Andrew J. Garger*  
*Water Quality Insurance Syndicate*  
*80 Broad Street*  
*New York, New York 10004*

*Richard H. Hobbie III*  
*Water Quality Insurance Syndicate*  
*80 Broad Street*  
*New York, New York 10004*

**ABSTRACT:** Marine casualty response has become increasingly complex. Many responsible parties (R.P.'s) do not have the financial resources to fund the potentially high cost of spill response and other aspects of a casualty and they must rely on their various marine insurers, including hull, protection and indemnity, and pollution to cooperate in a timely and effective response. While underwriters have traditionally worked together to coordinate their response and solve response issues, clear responsibility for certain aspects of response has become blurred because environmental concerns are playing a greater role in salvage, firefighting and other aspects of marine casualties. The pollution liability insurers are increasingly being asked to both finance and oversee aspects of marine casualty response that have traditionally been part of the responsibility of other insurance interests. Increased environmental sensitivity, however, should not lead to a shift in the traditional roles of marine insurers in responding to marine casualties. Instead, the marine insurance industry must look to new ways to address the interplay of their coverages to ensure timely casualty response and funding of all necessary operations. This paper will outline possible approaches to address this issue and explore the problems of establishing a market protocol. The protocol could address initial funding of the casualty response and the use of dispute resolution mechanisms such as arbitration. There may also be value in developing a United States agreement along the lines of the Special Compensation P & I Clause (SCOPIC) and there may also be a need to create a new open salvage contract.

## Introduction

**The Marine Insurance Market.** The insurance for a vessel can include many separate policies with different underwriters covering the cargo, containers, hull, total loss only, tower's liability, pollution, protection and indemnity, and excess liability. Not only can you have separate policies with separate companies, but you can also have multiple companies participating on any one given policy. Coverage for each of these policies may be placed in different or multiple countries around the world. The marine insurance market has grown in size and complexity during the past 300 years and has become an integral part of

international trade and business. For example, capacity for specific risks was developed in the 1970's, involving the entire global marine insurance market, to allow the insurance of the massive oil and gas platforms. This large insurance market for platforms continues to exist today.

As a result of the diverse and potentially numerous policies covering each vessel, marine casualties commonly involve more than one insurance coverage and more than one insurer. Thus, underwriters have traditionally worked together to solve any conflicting issues, such as whether an expense is chargeable to general average or particular average. This process, however, may involve drawn out negotiations over a lengthy period of time. Unfortunately, the emergency response phase of a pollution incident does not lend itself to slow analysis, deliberation, and negotiations by underwriters. Consequently, the traditional interrelationships among underwriters may not be effective in light of the inherent time limitations. Additionally, U.S. antitrust and restraint of trade laws make it virtually impossible for underwriters to agree in advance which elements of coverage will be provided by each of them and, accordingly, overlapping coverage often results.

**Oil Spill Response.** Oil and hazardous substance spills vary in size and complexity and generally arise from a marine casualty such as an allision, grounding, equipment failure, collision, fire or the threat of sinking. OPA '90 imposes liability on an R.P. for costs and damages arising from a discharge of oil or a "substantial threat of a discharge" of oil. There are similar response requirements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Public Law 96-510, as amended) ("CERCLA") with respect to a release or substantial threat of a release of a hazardous substance. In this paper, we will mostly limit our discussion to OPA '90 liabilities.

When an oil spill occurs, there are typically other casualty-related concerns, including cargo damage, salvage, wreck removal, lifesaving, and personal injury. In the international blue water market, hull, cargo and P&I underwriters will have in many cases negotiated an allocation of liabilities amongst themselves as a part of the basic placement of the insurance. However, it is important to remember that the issues raised here with respect to coordination of insurance coverages in response to a casualty will be applicable to a casualty outside of the U.S. depending on

what underwriters and which policies are involved. One should not assume that the relationships among underwriters that we are describing are limited to the U.S. In fact, disputes over coverage among underwriters is a global situation that requires constant negotiation and, in some cases, litigation.

In the U.S., a vessel owner R.P. will likely rely on its various insurers to either fund a casualty response or approve expenses that will later be indemnified. Coverage under some policies may actually be voided if a vessel owner does not obtain prior approval of expenses. When an oil spill occurs in the U.S., there will often be a separate pollution liability underwriter involved, such as the Water Quality Insurance Syndicate (WQIS). Additionally, because casualties generally require actions in addition to the OPA'90-driven response to a discharge or threat of a discharge, the cooperation and involvement of all of the R.P.'s insurers are critical to ensure clarity and timely funding of a response. This includes hull insurers, P&I insurers, pollution liability insurers, and any other insurer whose coverage is implicated in the casualty. On an operational level, the surveyors that are on-scene representing certain underwriters will also have to cooperate with the SMT that is assigned by either the pollution liability underwriter or, in the case of an insured that does not have separate pollution coverage, the P&I underwriter.

You can have more than one vessel involved in a casualty and more than one R.P. Of course, when the number of parties increases, the complexity of an event increases, and there is even a greater need to garner the cooperation of all the insurance stakeholders and their representatives.

An R.P.'s multiple insurers often have legitimate disputes over the allocation of expenses and potential overlapping coverage. For example, the allocation of liabilities between pollution liability insurers and hull or P & I insurers with respect to whether certain expenses are for sue and labor, cargo removal, pollution response, or salvage is often an issue.

Dialogue and cooperation among an R.P.'s underwriters are even more important in light of the Coast Guard's recently proposed regulations that would require tank vessels to identify the salvage and marine firefighting services that they will rely on in the event of a casualty. OPA-90 requires Vessel Response Plans to include this information, but the initial regulations were left general due to concerns among those affected over the adequacy of existing resources and disagreement about what level of resources was appropriate. The U.S. Coast Guard finally brought out its proposed rules for salvage and marine firefighting for tank vessels in May 2002. These rules require response times for this equipment based on a range of circumstances.

Planholders would have to arrange for services to be delivered by specific providers. Since the Coast Guard does not intend to certify providers of firefighting and salvage resources, as they do oil spill responders, planholders would be responsible for determining their adequacy. To ensure that contract negotiations do not delay response efforts, the Coast Guard is proposing to require written funding agreements, including a pricing list for services and equipment, between planholders and resource providers. The proposed rules elicited many comments from both the salvage industry which, predictably, is strongly in favor of the regulations, and the tank vessel industry, which is strongly opposed to the regulations because, among other reasons, it would place the entire burden of developing the salvage and firefighting infrastructure to comply with the rules on this industry sector. Additionally, the cost to implement the regulations could be huge. The Coast Guard is estimating it will cost approximately \$491 million over 30 years (in 2001 dollars). A majority of these costs would be incurred in the

implementation phase and is expected to only result in a minimal further reduction in spills.

If the salvage and firefighting regulations are adopted it is likely that salvage and firefighting resources will be attending casualties and working alongside spill response contractors to a greater extent than they do now. This makes coordination and cooperation among the R.P.'s insurers that are directing these resources even more critical.

## Discussion

A timely casualty response by the R.P. and its underwriters remains perhaps the most important factor in ensuring a successful spill cleanup. Consideration should be given to new ways that might help facilitate a timely response, including the following:

- a) Integration of the insurers, as financial stakeholders, into the Incident Command System;
- b) Development of a U.S. Open Salvage Form to include SCOPIC provisions; and
- c) Development of a market protocol that could address the funding of a response and dispute resolution mechanisms.

We will consider each of these concepts below.

**a) Inclusion of Underwriters in the Incident Command System.** The Incident Command System ("ICS") has been adopted in the United States for federal; state and local oil spill response efforts. The ICS was originally established as a scheme for organizing fire-fighting groups to combat forest fires in the western United States. The ICS has over time been used in other emergency response situations, including floods, earthquakes, train wrecks, and airplane crashes. Because response forces often came from different agencies and had to work across jurisdictional boundaries, it was necessary to create a system capable of integrating diverse groups and to provide a coherent organizational structure. The ICS and its derivative, the Unified Command System ("UCS"), have been employed to accomplish these objectives. The ICS system furnishes a standard organizational structure and defines the organizational authority and responsibility. The UCS provides a command structure that defines and integrates command responsibility for the various jurisdictions involved. In the context of the ICS, the OPA '90-mandated federal on-scene coordinator (FOSC) is the Incident Commander.

While the ICS has been effective in many ways in responding to spills, its use has not necessarily resulted in greater cooperation among Hull, P&I and other insurers in agreeing on the apportionment of coverage. For example, when a holed barge has its cargo offloaded, such action could be taken: 1) to protect the cargo, 2) for the safety of the vessel, 3) to allow the vessel to proceed to a repair facility, and 4) to prevent pollution. The determination of which interests various emergency actions are benefiting depends on the individual facts of each case and many times the interest overlap. The resulting conflicts between underwriters can adversely affect the positive outcome of the event. Indeed, at the recent National Salvage Conference in Seattle in January 2002 a major topic for a number of the panels was the issue that environmental concerns are becoming indivisible from the actual salvage operations. Contractors have traditionally been compensated in many cases by the success of the salvage. Now there is a need for salvage interests to be paid for their pollution abatement activities even though the salvage is unsuccessful. Any salvage operation where there is a pollutant

will be complicated by significant planning and procedures to mitigate any pollution threat.

One reason for the blurring of responsibility among underwriters is because the focus of the response has been placed on the R.P. as if the R.P. was in fact a solitary entity operating without numerous financial interests behind it, namely its insurers. The assured may be unable to commit or fund necessary response actions without the approval of its insurers. The FOSC must recognize that it is a complex financial event in which numerous underwriters may have exposure for expenses that are not attributable to oil pollution response measures required under OPA '90. The failure to integrate the insurer stakeholders into the ICS decision-making process can often result in significant delays in the ability of the R.P. to make response decisions, thus preventing the best possible global resolution of an event.

An RP will likely rely on its insurers to either fund a casualty response or approve expenses that will be indemnified later. Because casualties generally require actions in addition to the OPA '90-driven response to a discharge or threat of a discharge, the cooperation and involvement of all of the responsible party's insurers is critical to ensure clarity and timely funding of a casualty response.

In the context of a casualty that involves an oil spill, the FOSC should require that some representative of all insurers, such as a surveyor, be on-scene to participate in the financial decisions made in the context of the ICS. The P&I carrier and other insurance interest should be required to work closely with the Coast Guard to address these non-OPA 90 expenses.

**b) Development of an "American LOF" with SCOPIC Provisions.** The original concept of Lloyd's Open Form (LOF) allowed a ship's master to agree to services from a salvor under the terms of a standard contract that was accepted as fair and reasonable by the entire maritime community. However, with increased scrutiny of casualties for environmental issues, salvors faced the risk that they would be forced by government agencies to perform extensive pollution prevention measures even where there was little likelihood of obtaining a substantial salvage award.

In an attempt to provide adequate compensation for salvors that provided substantial pollution response measures, Article 14 of the 1989 Salvage Convention was incorporated into the LOF. Under Article 14, special compensation could be awarded to the salvor when the special compensation exceeded the usual "no cure, no pay" salvage award. There was, additionally, "uplift" of the award available up to 30% to 100% under exceptional circumstances.

As a device for compensating salvors for their efforts in protecting the environment, the general view was that Article 14 fell short. Salvors did not always believe that the potential Article 14 awards were worth the potential liability risks for environmental damage and the costly arbitration process to obtain an award, among other things. As a result, the Special Compensation P & I Clause (SCOPIC) was developed. Although its use is voluntary, when SCOPIC is invoked it replaces Article 14. When agreed to by salvors and a vessel owner and its P & I club, the SCOPIC clause will result in the payment of pollution response charges by the P & I Club. The advantage of SCOPIC, from the point of view of casualty response, is that all of the underwriters will have clearly defines roles in the response and understand their responsibility for costs.

It should be understood that the LOF is not specific to U.S. law and it includes London arbitration so that it may not be appropriate or accepted in the U.S. It is also important to note that SCOPIC is an agreement between the International Group of P&

I Clubs and the salvage industry and is not currently applicable to the entire worldwide insurance market. The development of an "American LOF" specifically for risks in the U.S., along with a SCOPIC clause applicable to the U.S. insurance market, would result in greater certainty for casualty responders and underwriters with respect to expense allocation in the U.S.

**c) Development of a Market Protocol.** To help ensure timely funding for all aspects of a casualty response, a protocol could be developed that would apply in the event that there are multiple insurance policies insuring the same vessel that has a spill or discharge or threatened spill or discharge of oil or hazardous substances. Such a protocol could apply to policies issued by dedicated pollution underwriters, Protection and Indemnity ("P&I") underwriters, hull and machinery underwriters, excess liability underwriters, or any other vessel coverage.

Once a vessel subject to the protocol has a casualty, representatives from the respective insurers would attempt to act in a cooperative manner for the purpose of minimizing conflicts between the insurers, avoiding delays in the making of decisions by conducting direct and prompt communications, and maximizing service in the handling of the claim incurred by the common insured.

A preliminary step that could be taken would include a meeting or telephone conference among Claims Department personnel from the interested underwriters. They would first identify those services and charges that clearly fall under their respective policies and provide funding for those expenses. If there is a dispute among underwriters concerning whether or not certain actions constitute pollution abatement or wreck removal or salvage, underwriters would agree to jointly fund this response activity. Such equal payments of the disputed amounts would be made on a without prejudice basis and with all rights fully and expressly reserved by all underwriters.

Once the casualty response was complete, any disputed payments would be the subject of a dispute resolution mechanism. Any of a number of mechanisms could be used, including binding or non-binding arbitration or mediation.

While implementation of a protocol would not eliminate disputes among underwriters for ultimate responsibility for casualty response costs it would at least ensure that casualty responses are not unnecessarily delayed as a result of funding disputes. Costly litigation battles could also be avoided.

## Conclusion

All parties that have a financial interest in a casualty are best served by the prompt and efficient handling of the event. Since many responsible parties do not have the financial resources to fund the potentially high cost of spill response and other aspects of a casualty, they must rely on their various marine insurers to cooperate and fund these responses.

In light of the increasingly complex casualty response requirements and increased environmental sensitivity, the marine insurance industry must look to new ways to address the interplay of their coverages to ensure a coordinated and timely response and to solve response disputes in a timely manner. Participation by insurers in the ICS, utilization of an "American LOF" and SCOPIC, and development of a market protocol are all concepts that could help achieve these goals.

### **Biography**

Andrew Garger joined WQIS in 1997 as general counsel. His duties include supervising outside counsel in litigation matters, assisting WQIS management in various corporate and personnel matters, and overseeing WQIS' legislative efforts. Prior to joining WQIS, he clerked for a federal Court of Appeals judge and practiced admiralty law at law firms in Seattle and New York. He is also a member of the Maritime Law Association, the American Corporate Counsel Association, the American Bar Association, the New York Bar Association, and is the Vice Chairman of the Liability Committee of the International Union of Marine Insurance.

Mr. Garger is a graduate of New York University School of Law and the United States Merchant Marine Academy.

Richard H. Hobbie III is the President of the Water Quality Insurance Syndicate. He is a graduate of Columbia University and a former U.S. Coast Guard Officer. Mr. Hobbie is also the President of Wall Street Marine, Inc, CEO of Greenfish Software LLC, a Director of American Marine Management Services, Inc. and The Spill Control Association of America. He serves as President of The Board of Commissioners of Pilots of the State of New York. He is also a member of the Maritime Law Association of the United States serving on the Marine Ecology and the Navigation and Coast Guard Committees, Association of Average Adjusters of the United States, Society of Naval Architects and Marine Engineers, American Society of Naval Engineers and serves on the Liability Committee of the American Institute of Marine Underwriters.